In The

Supreme Court of the United States

October Term, 1979

No. 79-4

JASPER F. WILLIAMS, M.D., and EUGENE F. DIAMOND, M.D.,

Appellants,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-5

JEFFREY MILLER, Acting Director, Illinois Department of Public Aid,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

No. 79-491

UNITED STATES OF AMERICA,

Appellant,

v.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., individually and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, individually and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO VACATE IN PART, TO DISMISS IN PART, AND TO AFFIRM

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TABLE OF CONTENTS

CITATIONS

Cases

Constitution, Statutes, Regulations and Other Authorities

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* Jeffrey Miller has recently succeeded Arthur F. Quern as Director of the Illinois Department of Public Aid. Under Supreme Court Rule 48(3), he is automatically substituted for Mr. Quern as one of the appellants here. Because the jurisdictional statements of all the appellants refer to the state appellant as being Mr. Quern, however, appellees shall also do so.

Appellees David Zbaraz, Martin Motew and Jane Doe, on their behalf and on behalf of all others similarly situated, and the Chicago Welfare Rights Organization, pursuant to Supreme Court Rules 16 and 35, respectfully move that:

I. Paragraphs 4(a)(ii) and 4(b)(ii), and the second sentence of Paragraph 5 of the Final Judgment and Order of the United States District Court for the Northern District of Illinois (which grant relief with respect to Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978), the "Hyde Amendment"), be vacated, on the ground that no case or controversy is presented as to the constitutionality of that provision; and

II. The judgment and order of the District Court be otherwise affirmed in its constitutional holdings, on the ground that the questions presented are so unsubstantial as not to require further argument; and

III. The appeal of intervenors Williams and Diamond (the "intervenors"), insofar as it seeks review of the previous decision of the Court of Appeals, 596 F.2d 196 (7th Cir. 1979), with regard to the requirements of Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, be

A. dismissed, on the ground that the intervenors have never taken a timely appeal from that decision, and even if a timely appeal has been taken, 28 U.S.C. § 1252 does not confer jurisdiction to review it; or

B. if the relief sought in subparagraph III.A is denied, affirmed, on the ground that the question presented is so unsubstantial as not to require further argument.

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are designated in the Jurisdictional Statement of the United States, filed September 21, 1979, and in appellees' Conditional Petition for a Writ of Certiorari, No. 79-64 (the "Petition for Certiorari"), filed July 13, 1979, to review a previous Court of Appeals decision herein. The April 29, 1979, Memorandum Opinion of the District Court, previously cited as unreported, has now been reported at 469 F.Supp. 1212 (N.D. Ill. 1979).

JURISDICTION

The jurisdictional requirements are adequately set forth in the Jurisdictional Statement of the United States, insofar as appellants seek review of the judgment of the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1252. Insofar as the intervenors* seek review of the previous decision of the Court of Appeals, 596 F.2d 196 (7th Cir. 1979), this Court is without jurisdiction of that appeal, under 28 U.S.C. § 1252 or otherwise. *See* pp. 25-33 *infra*.

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* While the United States technically intervened in this case, it will be referred to throughout as the "United States." Only defendants Williams and Diamond will be referred to as the "intervenors."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Jurisdictional Statement of appellant Quern sets forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Appellees' Petition for Certiorari to review the decision of the Court of Appeals sets forth the Statement of the Case for this Motion as well.

QUESTIONS PRESENTED

1. When plaintiffs-appellees have never challenged Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978) (the "Hyde Amendment"), on constitutional or other grounds, and a ruling on the issue is not necessary to give them full relief, is there an absence of an article III case or controversy as to the constitutionality of that provision, so that the part of the District Court judgment granting relief with respect to it should be vacated?

2. Does Illinois' restrictive abortion funding policy, which denies coverage of almost all medically necessary abortions under otherwise comprehensive state medical assistance programs, violate the equal protection clause of the fourteenth amendment to the United States Constitution?

3. Does 28 U.S.C. § 1252 confer upon this Court jurisdiction over the intervenors' appeal, insofar as it seeks review of the Court of Appeals' earlier decision herein, 596 F.2d 196 (7th Cir. 1979)?

4. Does Illinois' restrictive abortion funding policy, which denies coverage of almost all medically necessary abortions under state medical assistance programs, violate Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*?*

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* If this Court resolves Question 3 in the negative, it will have no occasion to reach this question, which is presented only by the intervenors' appeal from the Court of Appeals' decision.

ARGUMENT

I.

THAT PART OF THE DISTRICT COURT JUDGMENT RULING ON THE HYDE AMENDMENT SHOULD BE VACATED, AS THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO THAT PROVISION.

Plaintiffs-appellees have never challenged the constitutionality of the Hyde Amendment in this litigation, or sought relief with respect to it or against any federal official.* *Zbaraz v. Quern*, 596 F.2d 196, 197 (1979); R. 133:** Transcript of April 30, 1979, hearing, 16-17; *see* Petition for Certiorari, 7-9, 25. The District Court recognized that plaintiffs were "attack[ing] only the legality of an Illinois statute." Memorandum Opinion, *reprinted in* U.S. Jurisdictional Statement, at 5a, n.3. It nonetheless passed upon the constitutionality of the Hyde Amendment because it reasonably read the Court of Appeals' decision as having required it to do so. *Id. See Zbaraz v. Quern*, 596 F.2d at 202.

One of the grounds appellees have advanced for granting their Petition for Certiorari is that the Court of

* Congress has enacted a new version of the Hyde Amendment: Pub. L. No. 96-86, § 118 (October 12, 1979). The new version is identical to that for FY 1979, except that it eliminates that part of the previous law providing federal funds for abortions "in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." This new, interim appropriations act expires on November 20, 1979.

** The record in this case was certified to the Clerk of the Court on June 20, 1979. Portions of the record cited herein will be designated by "R." followed by the number of the item in the record.

Appeals erred in directing the District Court to consider on remand the constitutionality of the Hyde Amendment. Petition for Certiorari, 25-26. Appellees have argued that the article III case or controversy predicate for the Court of Appeals' decision in this respect was absent, for they had never even challenged the constitutionality of the Hyde Amendment, relief against the restrictive Illinois abortion funding policy being sufficient to grant them the full relief they sought. *Id.*

On this appeal, this error should be dealt with by vacating the portion of the District Court's decision granting relief with respect to the Hyde Amendment, *viz*: ¶s 4(a)(ii), 4(b)(ii), and the second sentence of ¶5 thereof. The existence of an article III case or controversy as to the constitutionality of the Hyde Amendment requires that there be a " 'substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [appropriate relief].' " *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), *quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941). But here not only is there no "substantial controversy" between the parties as to the Hyde Amendment, there is no controversy at all. Similarly, "[t]his Court . . . 'has no jurisdiction [to pass upon the constitutionality of a federal statute] except as it is called upon to adjudge the legal rights of litigants in actual controversies.' " *United States v. Raines*, 362 U.S. 17, 21 (1960), *quoting Liverpool N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). In the exercise of that jurisdiction, it has insisted that it will "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.* Appellees have sought coverage within the Illinois medical assistance programs for all medically necessary abortions. Granting them relief against the Hyde

Amendment secures only federal reimbursement to Illinois for such abortions; it does not change the scope of the Illinois program. *See* Petition for Certiorari, 25. There is thus no necessity to pass upon the constitutionality of that federal statute.*

The "established practice" of this Court in dealing with a civil case from a lower federal court presenting issues as to which there is no article III case or controversy, because they have become moot or otherwise, is to reverse or vacate the lower court judgment as to those issues. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *Gallogly v. Larsen*, 420 U.S. 904 (1975); *United States v. Raines*, 362 U.S. 17, 20-28 (1960);** *see United*

* *Raines* also announced a related constraint: "never to formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, 362 U.S. 17, 21 (1960). This rule may independently command the same result. The Court of Appeals apparently viewed the question of the constitutionality of the Hyde Amendment under the fifth amendment as indistinguishable from the question of whether the restrictive Illinois abortion funding policy was constitutional under the fourteenth amendment, *see Zbaraz v. Quern*, 596 F.2d 196, 203 & n.22 (1979), thus suggesting that the constitutional rule governing disposition of the latter question would be the same, and no broader, than that governing the former. But as the District Court suggested, the two questions might well be different, U.S. Jurisdictional Statement, at 5a, n.3, so that the constitutionality of the Illinois policy might not be determinative of the constitutionality of the Hyde Amendment. While appellees take no position here with respect to the constitutionality of the Hyde Amendment, the analyses of the constitutionality of that provision and of the Illinois policy are not perforce identical; and this Court should not reach out to decide the Hyde Amendment question, even if an article III case or controversy as to it were present. *Cf. Fusari v. Steinberg*, 419 U.S. 379 (1975).

** When there is no case or controversy as to the entire case, of course, this Court remands with directions to dismiss the complaint. *E.g., Preiser v. Newkirk.* But when remaining

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Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1946).

II.

THE JUDGMENT OF THE DISTRICT COURT SHOULD OTHERWISE BE AFFIRMED, ON THE GROUND THAT THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The central question presented is whether Illinois may, consistent with its obligations under the fourteenth amendment, withdraw funding for most medically necessary abortions,* while continuing to fund es-

footnote continued
issues are sufficient to make the case justiciable, the Court retains jurisdiction to pass upon them, even where the issues deemed not justiciable are the ones upon which this Court's jurisdiction was originally invoked. *United States v. Raines*, 362 U.S. at 27-28 (appeal under 28 U.S.C. § 1252); *cf. Farmers & Mechanics Nat'l Bank v. Wilkinson*, 266 U.S. 503, 506 (1925). So here, if this Court vacates the District Court Hyde Amendment ruling, it still retains jurisdiction to pass upon the question of whether Illinois' restrictive abortion funding policy is constitutional, as to which there is very much a live controversy.

* The Final Judgment and Order that is the subject of this appeal defines a "medically necessary abortion" as:

> an abortion which is necessary for the preservation of the life or the physical or mental health of a woman seeking such treatment, in the professional judgment of a licensed physician in Illinois, exercised in light of all factors relevant to her health.

Final Judgment and Order, ¶2(d) (*reprinted in* U.S. Jurisdictional Statement, at 24a). That definition was adopted from *Doe v. Bolton*, 410 U.S. 179, 192 (1973). *See also Colautti v. Franklin*, 439 U.S. 379, 387-88 (1979); *Beal v. Doe*, 432 U.S. 438, 441 n.3 (1977).

The record below shows that abortions covered under the "medically necessary" standard constitute between 20% and 50% of all state-funded abortions performed in Illinois prior to

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sentially all other medically necessary procedures under comprehensive medical assistance programs. The Court of Appeals summarized three respects in which Illinois' restrictive abortion funding policy discriminates against those whose medical needs consist of medically necessary abortions:

> The constraints [Illinois] impose[s] . . . on medically necessary abortions which are not imposed on other kinds of medically necessary care include (1) [a requirement of] a greater degree of potential harm from withholding treatment (the threatened damage in the case of an abortion must be "severe and long-lasting"), (2) the threatened harm must be physical, and (3) two doctors must make the determination of likely harm. 596 F.2d 196, 202 n.18 (7th Cir. 1979).*

On remand, the District Court found, on the basis of a record that is unequivocal on the matter, that the Illinois discrimination subjects a pregnant woman "to considerable risk of severe medical problems, which may even result in her death," U.S. Jurisdictional Statement, at 17a, and that "the effect of the [Illinois] criteria . . . will be to increase substantially maternal morbidity and mortality among indigent pregnant

footnote continued

the imposition of restrictions on state abortion coverage. Memorandum Opinion, *reprinted in* U.S. Jurisdictional Statement, at 21a; R. 101: Exh. C, Depp Affidavit, ¶11; R. 100: Plaintiffs' Memorandum, 13n.1 and Exhibits cited therein. Abortions federally reimbursed under the Hyde Amendment standard constitute approximately 1.3% of all such abortions. *Id.* at 9n.2 and Exhibits cited therein.

* The Court of Appeals was specifically referring to the constraints imposed by the Hyde Amendment. But since the restrictive Illinois abortion funding policy mirrors the Hyde Amendment standards, the characterization is also applicable to that policy.

women."* *Id.* On the basis of these findings the Court held that the Illinois discrimination was not rationally related to any "legitimate, articulated state purpose. . . ." U.S. Jurisdictional Statement, at 9a (citing *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973)). The court specifically found no legitimate state "interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women." U.S. Jurisdictional Statement, at 18a.**

* Appellants obviously find themselves embarrassed by these findings. Having no basis—much less any in the record—on which to call them into question, however, appellants proceed as if such findings can be ignored. Appellant Quern thus refers without supporting reference to "some small degree of medical risk" and to "minimal . . . [e]ffect [on] pregnant indigent women." Quern Jurisdictional Statement, 19. The intervenors make the unsupported statement that "it is an undisputed fact that forms of medical treatment other than abortion exist to treat health problems in pregnancy. . . ." Intervenors' Jurisdictional Statement, 19n.2. It is unclear what the "fact" here asserted really is. The only sense in which the "fact" would be "undisputed," however, is the trivial and irrelevant one that *some* conditions for which abortion was medically indicated might be treated or dealt with less effectively by other means. If the alternative procedure were less risky than abortion, abortion would not be medically necessary to treat the condition. *See, e.g.*, R. 101: Exh. C, Depp Affidavit, ¶14 & *passim*. Appellants' only attempt to support an assertion of little danger to health from withholding medically necessary abortions is the intervenors' reference to a report of the Center for Disease Control. Intervenors' Jurisdictional Statement, 20. The report actually supports the District Court's findings. *See* Appellees' Memorandum in Opposition to Appellants' Applications for Stay, filed in this Court May 18, 1979, at 16-17. But it deals mainly with a matter beside the point: health problems resulting from the performance of abortions, not, as here, those resulting from poor women being unable to secure medically necessary abortions.

** The District Court was, of course, only following this Court's definitive balance of interests in *Roe v. Wade*, 410 U.S.

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The District Court's analysis emerges naturally from this Court's abortion decisions. Starting with *Roe v. Wade*, 410 U.S. 113 (1973), this Court has consistently held that no state interest in the abortion decision is sufficient to justify placing the pregnant woman's life or health in serious jeopardy. *Wade*, of course, divided pregnancy into three periods for purposes of legal analysis; the balance it struck in favor of women's privacy during the first two of those periods—before viability of the fetus—was grounded in the strict judicial scrutiny made appropriate by the fundamentality of the right of privacy in abortion decisions. For the period after viability, however, *Wade* acknowledged that the state could assert a compelling interest in the potential life of the fetus to justify regulation under the strict version of equal protection scrutiny. Even in the face of a compelling state interest, however, *Wade* insisted that the state could not prevent abortion "when it is necessary to preserve the life or *health* of the mother." 410 U.S. at 163-164 (emphasis added). If a compelling state interest could not justify state action endangering

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113 (1973). *See* pp. 12-13 *infra*. What this Court had found impermissible, the District Court characterized as illegitimate. The intervenors object to the District Court's terminology (Intervenors' Jurisdictional Statement, 20n.3), but whatever form of words is used, it is clear that the District Court's holding was that Illinois' reckless unconcern with actual maternal life and health is an irrational way to serve any legitimate interest that might be involved. Thus the District Court said that "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate." U.S. Jurisdictional Statement, at 20a. In similar fashion this Court found in *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978), that a Wisconsin law had adopted irrational means to pursue interests this Court acknowledged were "legitimate and substantial." *See also Craig v. Boren*, 429 U.S. 190 (1976).

a woman's health, it follows *a fortiori* that the weaker pre-viability, uncompelling state interest that is exclusively involved here cannot do so.

In *Doe v. Bolton*, 410 U.S. 179 (1973), *Wade's* companion case, this Court struck down several Georgia abortion regulations, repeatedly emphasizing the "patient's [medical] needs and . . . the physician's right to practice." 410 U.S. at 199 & *passim*. Indeed, *Bolton* explicitly struck down a two-doctor approval requirement, similar to the one imposed here, on the ground of its failure to satisfy the rational relationship test.* The Court held that the requirement had "no rational connection with a patient's needs and unduly infring[ed] on the physician's right to practice." 410 U.S. at 199.**

Similar solicitude for the health of the pregnant woman, and for the physician's role in protecting it, is the most persistent theme running through this Court's abortion decisions. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), a Missouri statute prohibited the use of saline amniocentesis as an

* Given the importance of moving quickly in abortion decisions, *Doe v. Bolton*, 410 U.S. 179, 198 (1973), the extra factor present here and not in *Bolton*—that the woman patient is threatened, perhaps imminently, with health damage from the pregnancy—makes the Illinois two-doctor requirement far more of an impediment to preserving a woman's health than was the Georgia statute. *See* R. 101: Exh. C, Depp Affidavit, ¶9; R. 101: Exh. E, Zbaraz Affidavit, ¶6.

** The *Bolton* court also stressed that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." 410 U.S. at 192. This is the definition of medical necessity adopted by the District Court. It was announced in *Bolton*, and reiterated in *Beal v. Doe*, 432 U.S. 438, 441n.3 (1977), to allow "the attending physician the room he needs to make his best medical judgment." 410 U.S. at 192.

abortion technique after the first twelve weeks of pregnancy. This was no absolute prohibition of abortion, for alternative abortion techniques remained permissible. This Court, however, looked behind purported legislative findings of fact and concluded that Missouri's prohibition of the saline method "as a practical matter . . . forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 79. For this reason:

> [T]he outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge. *Id.**

See also Singleton v. Wulff, 428 U.S. 106 (1976).

Colautti v. Franklin, 439 U.S. 379 (1979), returned to the same theme, striking down a Pennsylvania attempt to constrain the doctor's determination of viability of a fetus and the abortion techniques he might employ. The Court reiterated the *Bolton* standard of medical necessity, *id.* at 393-94, and reemphasized the place in the *Roe v. Wade* balance of the health of the pregnant woman. A state may not prohibit or even "regulate" abortion where abortion is "necessary, in appropriate medical judgment,

* The actual purpose of the Illinois policy is easier to bring into focus than was Missouri's. The Illinois policy was espoused in the legislative debates, because "It does not prohibit anybody from having an abortion. It prohibits the people on welfare from having an abortion." R. 26: Addendum K-14 to Plaintiffs' Brief, Remarks of Rep. Bradley. This purpose of preventing abortion is, of course, just as constitutionally impermissible here as it was in *Danforth*.

to preserve the life or health of the pregnant woman." 439 U.S. at 386-87.

To rebut this analysis, appellants throughout this litigation have relied almost exclusively on this Court's 1977 decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977). What they consistently ignore, however, is that the health considerations that were central to the District Court's analysis and to this Court's decisions reviewed above, were missing entirely from *Maher* and *Poelker*.* Once this simple fact is acknowledged, *Maher* and *Poelker* cannot be read to denigrate the constitutional significance of preserving the health of pregnant women

* *Maher* is the principal case, and it characterizes the abortions under discussion as "non-therapeutic" or "elective" no fewer than ten times. The same distinction between medically necessary and medically unnecessary abortion is made explicit for purposes of the statutory question addressed in the companion case of *Beal v. Doe*, 432 U.S. 438 (1977). The third abortion decision handed down that day, *Poelker v. Doe*, 432 U.S. 519 (1977), is marginally more ambiguous, not in anything said in the brief *per curiam* opinion, but because the lower court had noted that the woman plaintiff there did have some medical problems. *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). It is clear, however, that these medical problems were irrelevant to the legal issue as framed by the plaintiffs and by the district court. Thus the district court's unreported decision, p. 1a, *infra*, repeatedly characterizes the policy in issue as one that denied abortion "except for medical reasons." *See* pp. 1a, 2a, 3a, 7a, *infra*. This Court meticulously avoided joining any factual dispute about the medical necessity of an abortion for the *Poelker* plaintiff. 432 U.S. at 520n.1. Instead, it *explicitly characterized* the issue in the case as involving "*nontherapeutic*" or "*elective*" abortion, and deliberately identified the *Poelker* issue with the one elaborately explored in *Maher*. *Poelker v. Doe*, 432 U.S. at 519, 520, 521. As the District Court concluded below, this Court in *Poelker* "could not have intended . . . to obliterate the distinction it had carefully drawn in *Maher* between medically necessary and nontherapeutic abortions." U.S. Jurisdictional Statement, at 16a, n.9.

requiring abortions. *Maher* indeed reaffirmed the primacy of considering the woman's health. 432 U.S. at 472.

Appellants make extravagant claims in the name of *Maher* and *Poelker*. Appellant Quern finds in those cases a principle of "fiscal autonomy." Quern Jurisdictional Statement, 18. The intervenors cite them for a "principle of democratic consensus." Intervenors' Jurisdictional Statement, 16. Each of these slogans amounts to a claim that courts will not review decisions in social welfare programs, no matter how irrational or how unrelated they are to pursuit of legitimate state interests. If adopted, this approach would resurrect the discredited distinction between "rights" and "privileges," repudiation of which was repeated only last term in *Westcott v. Califano*, 99 S.Ct. 2655 (1979). *See also Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Maher and *Poelker* support no such scuttling of established constitutional law. *Maher*, indeed, explicitly repudiates it: "[W]hen a state decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." 432 U.S. 464, 469-70 (1977).* And *Maher* goes on to quote the equal protection standards announced in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973)—itself a case involving public funding: legislation "must . . . be examined to determine whether it rationally furthers some legitimate articulated state purpose and therefore does not con-

* The United States omits this essential qualification, and thus provides a quotation from *Maher* that is quite misleading. U.S. Jurisdictional Statement, 12.

stitute an invidious discrimination. . . ." *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

This is not to deny that courts often accord substantial deference to state allocative decisions in social welfare programs, in the absence of some strong countervailing consideration such as the health of pregnant women in jeopardy here. *See Dandridge v. Williams*, 397 U.S. 471 (1970). There are, however, two further distinctions between this case and most welfare cases. First, this case involves not only medical necessity but also a woman's right to privacy in the abortion decision, making heightened judicial scrutiny appropriate. This point will be developed further below. *See* pp. 22-25 *infra*. Second, state welfare classifications are usually employed for the purpose of allocating limited funds among various groups of recipients. In such cases this Court cannot forbid the disfavoring of one group without placing the benefits of another group in jeopardy. The Court expressed this concern in *Dandridge* by saying:

> [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating *limited* public welfare funds among the myriad of potential recipients. 397 U.S. at 487 (emphasis added).

Illinois' refusal to fund medically necessary abortions, however, costs the state a great deal of money, thus diminishing the benefits available for all groups of recipients. As the District Court found, and state officials have effectively conceded, "the costs of pre-natal care, childbirth and postpartum care are substantially higher than the cost of abortions. . . . [I]f the newborn child then receives public aid, the cost differential is

even greater."* U.S. Jurisdictional Statement, at 14a. When this Court finds such a classification unconstitutional, it is faced with no allocative dilemma such as the one that concerned the *Dandridge* Court.

Appellants' misreading of *Maher* is profound indeed. For equal protection purposes, the essential distinction between this case and *Maher* is that in *Maher* there was no relevant discrimination. Connecticut had no program for funding any non-medically required procedures. Elective abortions were treated just like other elective medical procedures (*e.g.*, cosmetic surgery)—given neither public help nor hindrance. Similarly situated persons (*i.e.*, those with no medical need) received no care. There was thus, as a threshhold matter, no discrimination in the exclusion of a "particular medically unnecessary procedure—nontherapeutic abortions." *Beal v. Doe*, 432 U.S. 438, 446 n.11 (1977).

* Appellant Quern does not quarrel with this finding. Quern Jurisdictional Statement, 13. The intervenors do assert, however, Jurisdictional Statement, 17, as they repeatedly have below, that states can conclude that refusing to fund medically necessary abortions will save public assistance funds. The assertion is supported solely by one article's misleading characterization of the results of studies (not in the present record) of abortion laws in other countries, where both the laws and the countries' contraceptive traditions are dramatically different from those involved here. *See* R. 111: Plaintiffs' Memorandum, 6-9. Both the District Court and the Court of Appeals understandably paid the argument no heed when it was presented, along with appellees' more detailed rebuttal. *Id.* As Mr. Justice Stevens said in denying a stay in this case, "Both the findings of the District Court and the record before me compellingly demonstrate that it is less expensive for the State to pay the entire cost of an abortion than it is for it to pay only its share of the costs associated with a full-term pregnancy. . . . [T]he State will benefit financially. . . ." *Williams v. Zbaraz*, 99 S.Ct. 2095, 2098 (May 24, 1979).

These factors preordained the result in *Maher*. The equal protection clause does not require the state to subsidize the exercise of protected rights, even fundamental ones, in contexts where it has established no subsidy program at all; and so it did not require Connecticut to subsidize non-medically necessary abortions when the state had no existing program for subsidizing other, non-medically necessary procedures just because they happened to be provided by physicians. In the present case, however, medically necessary abortions are singled out as the only medically necessary procedure not covered under otherwise comprehensive medical assistance programs.* It is that discrimination that calls the equal protection clause into play.

* The United States points out, Jurisdictional Statement, 16n.8, that the Medicaid program does not fund in-patient hospital care in institutions for mental disease for persons between the ages of 18 and 65, or in institutions for tuberculosis. But its reliance on this restriction, citing *Kantrowitz v. Weinberger*, 388 F.Supp. 1127 (D.D.C. 1974), *aff'd*, 530 F.2d 1034 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 819 (1976), and *Legion v. Richardson*, 354 F.Supp. 456 (S.D. N.Y. 1973), *aff'd sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973), is misplaced. The failure to fund through Medicaid certain *state-provided* institutional care does not make rational the exclusion of *any* access to abortion care. The courts upheld the former exclusion on the grounds that Congress, in passing Medicaid and Medicare, had determined that patients in such institutions had historically been the responsibility of the states and should remain so. *Legion*, 354 F.Supp. at 459; *see also* S. REP. NO. 404, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2086. By definition, the "exclusion" only applies where the care is expected to be provided and has always been provided by the state, regardless of federal reimbursement. This constitutes neither an actual exclusion nor a barrier to care. In similar fashion, if Illinois had a non-Medicaid, generally available program of free abortions in state clinics, there would be no need for an overlapping system of Medicaid reimbursement.

Moreover, Medicaid coverage of outpatient psychiatric services does not, despite the United States' suggestion, Juris-

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Stripped of the support they seek from *Maher*, appellants must somehow claim that it is rational to sacrifice maternal health and life, a woman's privacy, and considerable public funds to some legitimate state interests at stake here. Attempting to delineate such an interest, the United States speaks of a "desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant." Jurisdictional Statement, 13. This is an expression, not of legitimate interest, but of constitutional conclusion. Any invidious discrimination in a spending program could similarly be

footnote continued

dictional Statement, 16n.8, change this analysis. The question here is not one of preference for one among two equally effective "kinds of treatment." By definition, childbirth is not an effective treatment when a medically necessary abortion is in order. R. 101: Exh. C, Depp Affidavit, ¶s 11-12.

Appellant Quern appears to be alluding to something more far-reaching when he characterizes the Illinois medical assistance programs as "non-comprehensive." Jurisdictional Statement, 17. The characterization is inaccurate if it is meant to suggest that Illinois excludes medically necessary procedures other than abortion. The Illinois Medicaid program covers "essential medical care." ILL. REV. STAT. ch. 23, § 5-1. The state-funded programs cover "necessary" medical "care" or "treatment." *Id.* at §§ 6-1, 7-1.

The Illinois Department of Public Aid Rules, set out at App. B, pp. 8a-14a *infra*, do exclude certain procedures from coverage. In the Court of Appeals, for instance, appellants placed reliance on the exclusions of artificial insemination, cosmetic surgery, acupuncture and non-therapeutic sterilization, and the restriction on quantities of drugs. These exclusions, however, represent plausible judgments that the procedures in question are not medically necessary. Its treatment of medically necessary abortions aside, if Illinois does exclude a type of medically necessary care from a category of care covered under its Medicaid Program, then it is acting in contravention of the Act. *See Zbaraz v. Quern*, 596 F.2d 196, 198-99 (7th Cir. 1979). Illinois' exclusion of medically necessary abortions from coverage is permissible under Title XIX only if the Hyde Amendment implicitly amends the substantive provisions of the Act. *Id.* at 199.

justified by taxpayer desire. *Cf. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). Appellant Quern and the intervenors speak of the state's interest in encouraging "childbirth," Intervenors' Jurisdictional Statement, 17; Quern Jurisdictional Statement, 18, citing *Maher v. Roe*, 432 U.S. 464 (1977), for the authority of the state to favor such an interest over a woman's right to seek an abortion. But in explaining the nature of such a state interest in *Maher*, this Court consistently referred not to "childbirth" but to "*normal* childbirth," *Id.* at 477, 478 (citing *Beal v. Doe*, 432 U.S. 438, 446 (1977)), which this Court has never held to encompass childbirth endangering the life or health of a woman. This Court's opinions establish rather that the State has no legitimate interest in promoting childbirth which is abnormal because it will be the proximate cause of impairing the woman's health. To injure the mother does not "*rationally* further" any state interest in *normal* childbirth. *Maher*, 432 U.S. 464, 478 (1977) (emphasis added).

The only legitimate interest of the state here is the same one the Court identified in *Wade* and other abortion decisions: protection of potential life. Illinois' devastating way of protecting that interest is reckless in the extreme. Perhaps inadvertently the United States captures exactly what is at stake here. "Congress [and presumably Illinois] could," the United States claims, "rationally choose not to fund any abortions [under state Medicaid programs]." Jurisdictional Statement, 16. This claim is made in the course of depicting the Illinois program restrictions as a mere "policy choice," as if all values were fungible, and as if *Roe v. Wade* and subsequent abortion decisions of this Court did not exist. If the United States is right, and actual maternal life, health and privacy could be sacrificed to potential life,

then rationality loses all meaning. If the rationality requirement retains any content, however, it places Illinois' reckless disregard of maternal life and health beyond legislative authority.

The District Court holding can also be affirmed because the appropriate equal protection test is strict scrutiny. The District Court rejected applicability of the compelling state interest test because it found, on the basis of *Maher*, that "there is no fundamental right to a publicly funded abortion. . . ." U.S. Jurisdictional Statement, at 12a. This misstates the fundamental right involved. The fundamental right is in making the abortion decision, *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Colautti v. Franklin*, 439 U.S. 379 (1979); *see Zablocki v. Redhail*, 434 U.S. 374, 385 (1978), not in the receipt of public funds, just as in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the plaintiffs' fundamental right was in deciding to travel, not in receiving welfare. But well-established fourteenth amendment law forbids the state to discriminate without compelling justification against exercise of that right, even if the discrimination is in a funding program. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *see Califano v. Webster*, 430 U.S. 313 (1977); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). *Maher v. Roe*, 432 U.S. 464, 470 (1977), explicitly reaffirms this principle, and nothing in it implies the contrary.

In this case, the only legitimate state interest furthered by the discrimination is protection of potential life. But *Roe v. Wade* itself established that such an interest is less than compelling until viability, while it is the pre-viability period that is in issue here. The equal

protection clause thus forbids the discrimination against appellee Doe's fundamental right to protect her health by choosing to have an abortion.

The District Court rejected this analysis, relying in large measure on this Court's discussion in *Maher* of *Shapiro v. Thompson*, 394 U.S. 618 (1969). The *Shapiro* discussion came in answer to the extreme claim advanced in *Maher*—that the state had an affirmative obligation to finance a woman's exercise of her fundamental privacy right. This Court rejected the analogy to *Shapiro*, saying:

> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under either the penalty analysis of *Shapiro* or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and [the later case of] *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. *Maher v. Roe*, 432 U.S. at 474n.8.

But what Illinois has done here is precisely analogous to the state action in *Shapiro* and quite unlike the state action in *Maher*.

Consider the case of a state without a medical assistance program that receives a request from a pregnant woman to finance an abortion she desires only because she does not want a child. Any claim of constitutional right to such financing would be rejected, because a state need not affirmatively subsidize exercise of even the most "fundamental" of rights. It is precisely such a claim for subsidy that this Court saw itself facing

in *Maher*. The plaintiffs there sought medical assistance funding for a nonmedical matter—purely elective abortions—and they had no more of a constitutional claim to it than they would to medical assistance funding to get them to the polls on election day.

In this case, however, in the context of state programs covering medically necessary services generally, plaintiffs, whose pregnancies endanger their health, seek medical assistance funding for necessary medical care. They are told that their health must be endangered, that their medical needs must be disregarded, because the medical treatment they require involves the exercise of the fundamental right to choose to have an abortion. That is precisely analogous to the refusal in *Shapiro* to extend welfare benefits to the single class of people who had exercised their fundamental right to interstate travel. It is virtually indistinguishable from a similar denial of medical benefits in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). In fact, the state action here is more clearly a "penalty" than that in either *Shapiro* or *Maricopa County*. *Shapiro* did not rest upon a determination that denial of welfare actually deterred interstate travel, 394 U.S. 618, 650 (1969) (Warren, C.J. dissenting). *See Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972). Similarly in *Maricopa County*, "there [was] no evidence . . . that anyone was actually deterred from traveling by the challenged restriction." 415 U.S. 250, 257 (1974). But here the Illinois law restricting abortion funding was intended to act* and

* The record amply demonstrates that the Illinois legislature was motivated by a desire to stop abortions for welfare recipients. Foreclosed by *Roe v. Wade* from outlawing abortions outright, the legislature chose the one group of people it thought it might prevent from obtaining abortions.

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does act as a very substantial impediment to poor women obtaining medically necessary abortions. *See Singleton v. Wulff*, 428 U.S. 106, 117 (1976). Defendant Quern expressed the opinion that it "would effectively result in the denial of a medical procedure, abortion, to low income persons who depend on public assistance programs for payment of medical bills." R.8: Plaintiffs' Memorandum, Exh. A; *see* p. 9n. *supra*. There is here, in other words, not only a penal result similar to that in *Shapiro* and *Maricopa County*, but the intentional and successful use of that penalty to deter exercise of specially protected fundamental rights.

III.

THIS COURT IS WITHOUT JURISDICTION OVER THE INTERVENORS' APPEAL INSOFAR AS IT SEEKS REVIEW OF THE EARLIER COURT OF APPEALS' DECISION HEREIN.

The Court of Appeals held that Title XIX of the Social Security Act, standing alone, required Illinois to cover all medically necessary abortions under its Medicaid program, but that the Hyde Amendment on appropriations had substantively amended Title XIX to permit Illinois to deny state support for all abortions other than those for which the Hyde Amendment provided federal funding. *Zbaraz v. Quern*, 596 F.2d 196, 199-202 (1979). The intervenors had argued that neither Title XIX nor the Hyde Amendment required Illinois to fund any abortions at all under its Medicaid program. Under this

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Representative Bradley's remarks quoted above, *see* p. 14n. *supra*, reflect the pervasive attitude of the Illinois legislature that abortion is the equivalent of homicide and hence to be stopped in virtually any way available. The Illinois legislative debates are contained in the record at R. 26: Addendum I-L.

view, plaintiffs-appellees would not have been entitled to even the limited injunction requiring coverage of all Hyde Amendment abortions which the Court of Appeals directed the District Court to enter on remand. *Id.* at 202. R. 87: Order, February 15, 1979 (entering injunction).*

On May 2, 1979, by the same notice of appeal by which they took their appeal to this Court from the April 30, 1979, District Court judgment, the intervenors purported to invoke 28 U.S.C. § 1252 (1976) to secure as well review of the Court of Appeals' decision. Intervenors' Jurisdictional Statement, at App. 11-12. The notice of appeal was filed in the United States District Court for the Northern District of Illinois. *Id.* at App. 9. It came 79 days after the Court of Appeals' decision it purports in part to appeal.

The attempt to secure appellate review of the Court of Appeals' decision falters on two independent grounds: first, no timely appeal from that decision—indeed no appeal at all—was taken within the meaning of the Rules of this Court; and second, even if a timely appeal had been taken from that decision, 28 U.S.C. § 1252 would not confer upon this Court jurisdiction to review the decision.

Supreme Court Rules 10 and 11, and 28 U.S.C. § 2101 (1976), as well as 28 U.S.C. § 1252, are determinative of this Court's jurisdiction to review on direct appeal the

* The District Court's subsequent April 30, 1979, injunction requiring coverage of all pre-viability medically necessary abortions did not entirely supersede the force of this earlier order. Thus, the February 15, 1979, injunction continues to require coverage of certain classes of abortions which the April 30, 1979, Order does not: *viz.*, all post-viability Hyde Amendment abortions, and pre-viability abortions for victims of rape and incest, even if not medically necessary.

Court of Appeals' decision at the intervenors' behest. Rule 10 provides that for an appeal from a federal court to be "taken" at all, the appellant must file his notice of appeal with the clerk of the court from which "the appeal is taken." Rule 11 requires, with exceptions not relevant here, that an appeal is "in time" when the notice of appeal is filed in the "appropriate court within the time allowed by law. . . ." The time "allowed by law" is set forth in 28 U.S.C. § 2101: a direct appeal under section 1252 "shall be taken within thirty days after the entry of the . . . judgment [being appealed]."

Thus, for the intervenors to have taken a timely appeal from the Court of Appeals' decision under 28 U.S.C. § 1252, they must have filed their notice of appeal within thirty days from that decision, and in the Court of Appeals. They did neither.*

The intervenors offer no reason for their failure to comply with Rules 10 and 11 or 28 U.S.C. § 2101. But in any case there is no "excusable neglect" or "harmless error" by which a party who has failed to take an appeal in a timely fashion—much less taken one at all—can escape the mandate of the rules requiring that one do so. "The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *United States v. Robinson*, 361 U.S. 220, 229 (1960). Appeals to this Court are consistently "dismissed for failure to file [a] notice of appeal within [the] time provided by this Court's Rule 11 and 28 U.S.C. § 2101." *Gabriel v. United States*, 429 U.S. 877,

* The intervenors have *never* filed a notice of appeal from the Court of Appeals' decision in that Court. Their appeal thus has never been "taken" at all within the meaning of Rule 10 requiring that "[an] appeal . . . shall be taken by filing a notice of appeal, . . . at the place prescribed by this rule. . . ."

877 (1976); *see Richardson v. Blumenthal*, 435 U.S. 939 (1978); *Art Theater Guild, Inc. v. Ohio ex rel. Schoen*, 421 U.S. 957 (1975); *Neale v. Hayduk*, 420 U.S. 915 (1975).*

Dismissal of the intervenors' appeal from the Court of Appeals' decision is independently required because 28 U.S.C. § 1252 does not confer jurisdiction upon this Court to review it:

> Direct appeals from decisions invalidating Acts of Congress.
>
> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . . holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States . . . is a party. 28 U.S.C. § 1252.

See also 28 U.S.C. § 2101.* This language simply does not describe the Court of Appeals' decision, which did not address the constitutionality of any federal statutory provisions. *Zbaraz v. Quern*, 596 F.2d 196, 202 (1979).

The intervenors rely on language in *Fusari v. Steinberg*, 419 U.S. 379, 387n.13 (1975), and *United States v. Raines*, 362 U.S. 17, 24n.4 (1960), that an appeal under 28 U.S.C. § 1252 brings the "whole case" before the Court. This reliance is misplaced. *United States v. Raines* and its few successors, *e.g.*, *McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975), are cases in which the only decision or judgment being appealed is one holding an "Act of Congress unconstitutional" within the meaning of section 1252. It is in that context that this Court has referred to section 1252 as bringing the "whole case" before the Court.** The referent of the term "whole case" in those decisions, giving it the most expansive reasonable reading, was to all questions passed upon by the Court in the process of "holding an Act of Congress unconstitutional," 28 U.S.C. § 1252, or to matters which might provide alternative grounds for

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* The intervenors' failure to file their notice of appeal from the Court of Appeals' decision in the "appropriate court" also dooms any argument they might advance that their appeal under 28 U.S.C. § 1252 should be construed as an appeal under 28 U.S.C. § 1254(2) (1976), providing for an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." For an appeal to be "taken" under this provision within the meaning of Rule 10 and to be "in time" within the meaning of Rule 11, it would also have to be filed in the Court of Appeals. Moreover, for an appeal to be "taken," the notice of appeal must "specify the statute or statutes under which the appeal to this Court is taken." S.Ct. R. 10. Nor is review of the Court of Appeals' decision at the intervenors' behest available under 28 U.S.C. § 2103 (1976), which authorizes the papers upon which appeals are taken to be treated as a petition for a writ of certiorari if the appeal to this Court "is improvidently taken." For this is not a case where the intervenors' appeal from the Court of Appeals' decision has been "improvidently" taken; it is one where no timely appeal has been taken at all. *Compare Palmore v. United States*, 411 U.S. 389, 395-97 (1973), *and El Paso v. Simmons*, 379 U.S. 497, 501-03 (1965) (granting certiorari pursuant to section 2103, after dismissing appeals because not within Court's appellate jurisdiction under 28 U.S.C. §§ 1254 or 1257 (1976)), *with* cases cited at pp. 27-28 *supra* (not considering applicability of section 2103, after dismissing appeals as untimely). *See Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 515, 526n.4 (1957) (Frankfurter, J. dissenting).

* Providing, in relevant part, that a "direct appeal to the Supreme Court from any decision under sections 1252 . . . of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the . . . judgment [being appealed]."

** *Fusari v. Steinberg*, 419 U.S. 379 (1975), and *Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916), also cited by the intervenors (Jurisdictional Statement, 4-5), are likewise cases in which only a single decision was being appealed. In neither case, moreover, was review even being sought under section 1252.

affirmance of that decision.* Those cases therefore do not support the conclusion that section 1252 confers jurisdiction to review quite a different decision, from a different court. Indeed, read in that way, the "mandatory and jurisdictional" time limits for seeking appellate review in this Court could be rendered advisory only. Thus, the intervenors' reading of section 1252 is, in effect, that that provision, if otherwise properly invoked to secure direct review of a decision holding an Act of Congress unconstitutional, also confers jurisdiction upon this Court to review any final judgments previously rendered in the same case, even if they were entered years before, and never appealed. *Compare* 28 U.S.C. § 2101.

The applicable and governing cases here are not the ones upon which the intervenors rely, but such decisions as *Farmers & Mechanics National Bank v. Wilkinson*, 266 U.S. 503 (1925), and cases cited therein, 266 U.S. at 506, *e.g.*, *Brown v. Alton Water Co.*, 222 U.S. 325, 331-34 (1912), and *Union Trust Co. v. Westhus*, 228 U.S. 519, 522-24 (1913), which arose under the Judicial Code of 1911 or that of 1891, providing for direct appeal from the district courts to this Court in an extremely broad class of cases. In each of these cases, this Court

* These decisions may be read more narrowly, to permit review only of issues passed upon by the lower federal court and appealed to this Court, issues which might provide alternative grounds for the lower court's decision, or threshold jurisdictional issues. *Cf. United States v. American Friends Service Committee*, 419 U.S. 7, 9n.3, 12n.7 (1974). Even under this narrower reading, this Court would have jurisdiction to reverse or vacate that part of the District Court judgment holding the Hyde Amendment constitutional (*see* Section I *supra*), despite appellees' having withdrawn their appeal from that part of the District Court's judgment, since the absence of any case or controversy as to the Hyde Amendment eliminates the District Court's subject matter jurisdiction over that question. *And see* FED. R. CIV. P. 60(b)(5), (6).

dismissed direct appeals from district court decrees which merely gave effect to earlier decisions of the courts of appeals in those cases, by "apply[ing] the law of the case arising from the decision of the [appeals court]." *Brown v. Alton Water Co.*, 222 U.S. at 332. The principle governing the disposition of each appeal in this Court was that the direct appeal in effect sought this Court's review of the earlier court of appeals' decision, and that review of that decision could only be taken by an appeal from, or a writ of error directed to, the decision of that court, not under the provisions for direct appeals from the district courts. Thus, in *Union Trust Co.* this Court characterized appellants' attempt to secure review of the court of appeals' decision, by taking a direct appeal from the subsequent district court decision, as involving an "assertion that by virtue of the power conferred to take a direct appeal from one court, authority is given to indirectly review the decision of another and higher court . . ." 228 U.S. at 522. *See* discussions in *Farmers & Mechanics National Bank*, 266 U.S. at 506; *Union Trust Co.*, 228 U.S. at 521-24; *Brown*, 222 U.S. at 330-34.

Farmers & Mechanics National Bank, *Union Trust Co.*, *Brown* and their companion cases support dismissal of the intervenors' appeal from the Court of Appeals' decision.* Like appellants in those cases, the intervenors

* Shortly after *Farmers & Mechanics Nat'l Bank* was decided, Congress sharply restricted the types of cases which could be appealed from district courts directly to this Court. Act of February 13, 1925, ch. 229, 43 Stat. 938. Presumably for this reason, and because the types of cases which have since been subject to review by this Court on direct appeal from district courts, *see, e.g.*, 28 U.S.C. § 2284 (1976), are not ones likely to have first gone to the court of appeals, it appears that the jurisdictional question *Farmers & Mechanics*

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are seeking to secure review of a Court of Appeals' decision, by taking a direct appeal to this Court under a provision which, by its terms, does not confer jurisdiction to review that decision at all.* Like appellants in those cases, the intervenors had at their disposal provisions for review of "cases in the courts of appeals." 28 U.S.C. § 1254(1), (2) (1976). They chose not to resort to these, which might well have secured for them the review of the Court of Appeals' decision they now belatedly seek. And nothing in the Rules of this Court, the case law, the important principles underlying the finality of judgments, or the language of 28 U.S.C.

footnote continued
Nat'l Bank and its predecessors addressed did not later arise with any frequency or at all. In any event, that case, save for the later summary decision in *United States v. Naponiello*, 267 U.S. 577 (1925), would appear to be the last of its line. But neither its authority, nor that of its predecessors, has ever been called into question by any decision of this Court.

* In *Farmers & Mechanics Nat'l Bank*, *Brown*, and *Union Trust Co.*, appellants were seeking to secure review of the court of appeals' decision indirectly, by appealing from the subsequent district court order giving effect to that earlier decision. Here, of course, the District Court's decision on the constitutional questions before it did not give effect to the earlier Court of Appeals' decision, which did not address these questions. In this sense, the intervenors, by appealing from the Court of Appeals' decision under 28 U.S.C. § 1252, are seeking to do "directly" what the appellants in the *Farmers & Mechanics Nat'l Bank* line of cases sought to do "by indirection." *Union Trust Co. v. Westhus*, 228 U.S. at 522 (1913).

The intervenors' Notice of Appeal also stated that they were appealing directly to this Court, under 28 U.S.C. § 1252, the February 15, 1979, District Court Order which gave effect to the Court of Appeals' decision on the statutory questions resolved by it. Intervenors' Jurisdictional Statement, at App. 12. The intervenors' Jurisdictional Statement suggests that they have abandoned this appeal. *Id.* at 4-5. In any event, pursuit of such an appeal would fall squarely within the principle of the *Farmers & Mechanics Nat'l Bank* line of cases.

§ 1252 itself suggests that they should be permitted to secure that review now. *Cf. United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

IV.

THE SOCIAL SECURITY ACT AND IMPLEMENTING FEDERAL REGULATIONS REQUIRE ILLINOIS TO COVER ALL MEDICALLY NECESSARY ABORTIONS UNDER ITS MEDICAID PROGRAM.

When this case was previously before Mr. Justice Stevens, and then the full Court, on appellants' unsuccessful applications for a stay of the District Court's April 30, 1979, judgment,* *see Williams v. Zbaraz*, 99 S.Ct. 2095 (May 24, 1979) (Mr. Justice Stevens in chambers); *Williams v. Zbaraz*, 99 S.Ct. 2833 (June 4, 1979), appellees presented at length the arguments in support of their claim that the Social Security Act requires Illinois to cover all medically necessary abortions under its Medicaid program. *See* Appellees' Memorandum in Opposition to Appellants' Applications for Stay (the "Stay Memorandum"), filed May 18, 1979, at 12-14 and Exh. D thereto. *See also* Petition for Certiorari, 14-18.

The question of whether the Social Security Act permits Illinois to cover only those abortions necessary to preserve the pregnant woman's life, *see* Intervenors' Jurisdictional Statement, 8 (Question IV), and p. 5 *supra* (Question 3), is one not properly before this Court on this appeal. *See* Section III *supra*. If that question is addressed on its merits in this appeal, however, this Court should, for the reasons stated in the Stay Memorandum and the Petition for Certiorari summarily affirm the Court of Appeals' judgment insofar as it held

* Only the state appellant and the intervenors sought a stay.

that Title XIX, standing alone, requires Illinois to cover all medically necessary abortions under its Medicaid program, and summarily reverse it insofar as it held that the Hyde Amendment operates substantively to amend Title XIX, so as to permit Illinois to deny state support for almost all medically necessary abortions.*

CONCLUSION

For the reasons stated above, appellees' Motion to Vacate in Part, to Dismiss in Part, and to Affirm should be granted.

Respectfully submitted,

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October 29, 1979

* Indeed, if appellees are deemed to be entitled to raise their statutory Hyde Amendment claim as an alternative ground for affirmance of the District Court judgment, *see* Petition for Certiorari, 13n.14, then this Court could summarily affirm that judgment on that (alternative) ground, without reaching the constitutional questions passed upon by the District Court, or the intervenors' statutory question of whether Title XIX, standing alone, requires funding of all medically necessary abortions under state Medicaid programs.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,

Plaintiff,

vs.

JOHN H. POELKER, et al.,

Defendants.

No. 73C 565 (A)

MEMORANDUM AND ORDER

This is an action by plaintiff seeking to have declared as unconstitutional those rules and regulations of the public hospitals of the City of St. Louis, Missouri, which prohibit utilization of city hospital facilities and personnel for the performance of abortions except for medical reasons.

Plaintiff, suing under the pseudonym of Jane Doe, is a married woman who was pregnant at the time of the filing of the complaint. Defendants are John H. Poelker, Mayor of the City of St. Louis, Missouri, and R. Dean Wochner, Director of Health and Hospitals for the City of St. Louis.

Plaintiff brings this cause of action on her own behalf and on behalf of the entire class of women who reside in St. Louis and desire to utilize the services of the St. Louis public hospitals in order to obtain abortions. Jurisdiction of this Court is invoked pursuant to 28 USC 1343, 2201 and 2202, and 42 USC 1983. Plaintiff contends that on two separate occasions during August of 1973 she sought an abortion at Starkloff Memorial Hospital, a public hospital run by the City of St. Louis, but was refused based upon

the hospital's policy against performing non-therapeutic abortions. Such policy is alleged to be violative of various constitutional rights, including: The right to privacy within the patient-physician relationship; the right to obtain medical services; the right to determine whether to bear children and maintain marital privacy; the right to receive adequate medical advice pertaining to pregnancy; and the right to equal protection and due process of law. Plaintiff seeks a judgment declaring invalid all policies and regulations of the St. Louis public hospitals which restrict the use of their personnel, services and facilities for the performance of non-therapeutic abortions, and requests that defendants be permanently enjoined from enforcing such policies.

St. Louis operates two general public hospitals, Max C. Starkloff Hospital and Homer G. Phillips Hospital, designated City Hospital Numbers 1 and 2, respectively. The policy regarding performance of abortions in the city hospitals is embodied in the hospital by-laws, which provide that abortions shall be performed only for "medical reasons" (Defendants' Answer to Plaintiff's Interrogatory No. 1). This policy was in effect at both St. Louis public hospitals at all times relevant to this lawsuit, and remains in effect today.

At trial plaintiff testified that she has two children and has miscarried five times since being married in 1965. In 1973 her husband was arrested for a felony and faced with possible imprisonment. In July, 1973, plaintiff missed her menstrual period and on August 7th she went to the gynecology clinic at St. Louis City Hospital Number 1 to determine if she was pregnant. At the clinic she was examined by a third-year medical student assigned to the hospital. Plaintiff testified that she inquired about abortion services at that time, although the student who examined her had no recollection of such a conversation. That examination disclosed no medical justification for an abortion.

On August 13th, plaintiff returned to the gynecology clinic for the results of her laboratory test. Upon being told

she was pregnant she requested that the hospital perform an abortion. The medical student who examined her on this occasion testified that he found nothing to indicate that an abortion should be performed. He stated at trial that he was not aware of the city's policy against abortions, but told plaintiff that he did not know of anyone at the hospital to refer her to that was not opposed to abortion for moral reasons. However, he made an appointment for her to visit the obstetrics clinic the next day.

On August 14, 1973, plaintiff was interviewed by Dr. William J. Ott at the Starkloff Hospital (City Hospital Number 1) obstetrics clinic, who told her that her medical condition did not indicate that an abortion was necessary, and that his personal beliefs precluded him from performing abortions. Plaintiff was examined the same day and again on August 15th by Dr. Ziad Abu Dalu, who confirmed that there were no medical reasons to justify termination of her pregnancy and that the hospital could not comply with her request for an abortion. Although Dr. Dalu did not discuss his personal beliefs with plaintiff at that time, the record discloses that as a member of the Moslem faith Dr. Dalu would refuse to participate in an abortion.

The instant suit was filed August 17, 1973. Subsequently, on August 22nd, plaintiff procured an abortion at a private St. Louis abortion clinic.

Plaintiff now contends that the above policy of the St. Louis City public hospitals contravenes certain recent court decisions which deal with the constitutionality of abortion regulation. Defendants maintain that such a policy is in violation of neither express nor judicially established constitutional principles. In addition, defendants state that continued enforcement of this policy has since 1973 been supported by Missouri statute, to wit, RSMo 197.032, which was passed in that year and which provides in part:

> "1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall

be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes."

Plaintiff does not seek to challenge RSMo 197.032 in this proceeding.

Plaintiff has cited to this Court the recent companion Supreme Court case of *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973), which established the principle that a woman has a qualified right to obtain an abortion, which right may override the state's interest in restricting her decision during early stages of pregnancy. The Court's attention is also directed to the subsequent Eighth Circuit decision of *Nyberg* v. *City of Virginia,* 495 F. 2d 1342 (1974). In that case the Court was presented with a request from two duly licensed physicians that they be permitted to use the facilities of the public municipal hospital at Virginia, Minnesota, in order to perform abortions on their patients who desired such services. Although plaintiffs were members of the hospital staff, they were precluded from performing abortions there by a hospital resolution similar to that in effect at the St. Louis City public hospitals.

In *Nyberg* the Eighth Circuit Court of Appeals first stated that the abortion procedure was no more complicated than other surgical procedures which the plaintiff-physicians were permitted to perform at the hospital. In ruling in favor of the doctors, the Court went on to say at page 1346:

"It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made

by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation."

Plaintiff now claims that under the authority of these decisions, a public hospital must be required to provide facilities and personnel to any woman requesting that such hospital perform an abortion on her. This Court does not believe that the above cases were intended to establish such a broad proposition as that now urged by plaintiff.

In *Doe* v. *Bolton,* supra, the Supreme Court invalidated certain portions of Chapter 26-12 of the Georgia Criminal Code on grounds that it was over-restrictive of the circumstances under which a physician could perform an abortion. However, the Court explained at page 189 that:

"Roe v. Wade, supra, sets forth our conclusion that a pregnant woman does *not* have an absolute constitutional right to an abortion on her *demand.*" (Emphasis added.)

Furthermore, in *Doe* the Court let stand Section 26-1202 (e) of the Georgia statute which provided as follows:

"Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person."

With regard to this provision, which is very similar to RSMo 197.032, the Supreme Court stated at pages 197-198 of its opinion:

> "Under §26-1202(e), the hospital is free *not to admit* a patient for an abortion. * * * Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. * * * §26-1202(e) affords adequate protection to the hospital * * *." (Emphasis added.)

It is, therefore, axiomatic that no physician or other hospital employee may be compelled to perform an abortion in violation of his personal beliefs. *Nyberg* merely held that where a physician on the staff of a public hospital desired to perform a non-therapeutic abortion, the state could not place an absolute bar on that decision. The Court concluded at page 1347 of that opinion:

> "[W]hile we propose to fashion no specific procedures which must be followed *nor to require any individual staff members to participate in* abortion procedures, we do so hold that the hospital facilities must be made available for abortion services, as they are for other medical procedures, *to those physicians* and their patients who have a right to and *request* such facilities." (Emphasis added.)

A careful reading of the *Nyberg* decision discloses that it falls far short of holding that a hospital, albeit open to the public, must be forced to furnish physicians for women desiring to obtain abortions. The Court was careful to point out that :

> "Contrary to the view taken by appellant, Roe and Doe do not suggest *and no hospital need provide* facilities for an abortion merely upon a mother's demand." (Emphasis added.) 495 F. 2d at page 1346, footnote 5.

In the instant case this Court is not presented with a request from any physician desirous of using the St. Louis City hospital facilities in order to perform an abortion

upon his patient. Nor is there anything in the record to show that there is any physician presently on the staff of either public hospital in St. Louis who is willing to admit the plaintiff as his patient for such a purpose. To the contrary, all of the medical personnel who examined plaintiff at Starkloff Hospital stated emphatically that they hold strong personal beliefs against abortion, and at one point plaintiff was told that there was no one to refer her to who was willing to perform such a procedure in the absence of any medical justification.

In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles, and this Court will issue no order designed to have such an effect.

This memorandum opinion is adopted by the court as its findings of fact and conclusions of law, and the clerk of the Court is directed to prepare and enter the proper order finding for the defendants.

/s/ .....
U. S. District Judge

December 17, 1974

APPENDIX B

ILLINOIS DEPARTMENT OF PUBLIC AID RULES

Rule 4.01 Medical Assistance Program—General Provisions

(a) Under the Medical Assistance Program, the Department pays participating providers for essential medical care for eligible persons when the care is not available without charge or covered by health insurance and the person needing care has insufficient resources available to meet the cost of the required care at Department standards.

(b) "Essential medical care" is that which is generally recognized as standard medical care required because of disease, disability, infirmity or impairment.

(c) The Department may impose prior approval requirements, as specified by rule, to determine the essentialness of medical care provided in individual situations. Such requirements shall be based on recommendations of technical and professional staff and advisory committees.

(d) When recipients are entitled to Medicare benefits, the Department shall assume responsibility for their deductible and coinsurance obligations, unless the recipients have income and/or resources available to meet these needs. The total payment to a provider from both Medicare and the Department shall not exceed either the amount that Medicare determines to be a reasonable charge or the Department standard for the services provided, whichever is applicable.

(e) The Department shall pay for services and items not allowed by Medicare only if they are provided in accordance with Department policy for recipients not entitled to Medicare benefits.

(f) The Department shall require prior approval for the prescription of any items not otherwise excluded by rule but not listed in, or in excess of the quantities listed

in, the Department Drug Manual. Approval will be given if the item or quantity is determined appropriate for the condition to be treated in the judgment of a consulting physician or dentist of the Department. Drugs shall be added to or removed from the Drug Manual on the basis of the Department's evaluation of changes in the listing of drugs recommended by the Committee on Drugs and Therapeutics of the Illinois State Medical Society. The Department evaluation shall include an assessment of the therapeutic value and cost impact.

Rule 4.011 Available Medical Services And Supplies

(a) Recipients shall have free choice of medical providers. Medical Services and supplies for which payment may be made by the Department are:

(1) AABD, AFDC, MANG, REFUGEE/REPATRIATE
- Physicians' services
- Dental services
- Podiatry services
- Chiropractic services
- Optical services and supplies
- Independent laboratory services
- Pharmacy services
- Hospital services
- Clinic services
- Home health services
- Group care services
- Medical equipment, supplies and prosthetic devices
- Medicheck services (early and periodic screening, diagnosis and treatment)
- Transportation necessary to secure medical care
- Family planning services
- Psychological services

(2) GA, AMI
- Inpatient hospital care, excluding physical rehabilitation and psychiatric services

Outpatient hospital care, excluding physical rehabilitation and psychiatric services
Organized clinic care
Laboratory services
Physicians' services
Drugs
Family planning supplies and services
Nursing home services
Emergency dental care for the relief of pain and infection, including necessary fillings and extractions
Transportation to and from the source of medical care payable by vendor payment, only with prior approval, except for emergency situations which require post approval

(b) Services and supplies for which payment will not be made:

Services available without charge
Services prohibited by State or Federal law
Experimental procedures
Research oriented procedures
Medical examinations required for entrance into educational or vocational programs
Autopsy examinations
Preventive services, except those provided through the Medicheck program for children through age 20, and required school examinations
Routine examinations
Artificial insemination
Abortion, except in accordance with Rule 4.03
Medical or surgical procedures performed for cosmetic purposes
Medical or surgical transsexual treatment services
Diagnostic and/or therapeutic procedures related to primary infertility/sterility
Acupuncture
Subsequent treatment for venereal disease, when such services are available through State and/or local health agencies

Medical care provided by mail or telephone
Unkept appointments
Non-medically necessary items and services provided for the convenience of recipients and/or their families
Preparation of routine records, forms and reports
Visits with persons other than a recipient, such as family members or group care facility staff.

Chapter 1100 Medical Assistance Program AFDC

The Medical Assistance Program provides for payment for essential medical care for eligible persons when the care is not available without charge or covered by health insurance and to the extent that resources available for payment for medical care do not meet the cost of care at Department standards for the services and/or supplies provided.

Only services and supplies which meet the Department of Health, Education and Welfare definition of medical services, and can be paid by vendor payment, are provided through the Medical Assistance Program.

1100.1 *Essential Medical Care*

Essential medical care is defined by the Department as that which is generally recognized as standard medical care required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the essentialness of medical care provided in individual situations based on recommendations of technical, professional staff and advisory committees.

To make this determination the Department may impose prior approval requirements whenever indicated.

1100.2 *Freedom of Choice*

Recipients have freedom of choice among participating providers of medical services. They are free to contact or reject any medical care or treatment plans recommended subject to provisions as indicated in PO-425.2 - 430.0 - 440.2(c).

Chapter 1100 Medical Assistance Program AABD

The Medical Assistance Program provides for payment for essential medical care for eligible persons when the care is not available without charge or covered by health insurance and to the extent that resources available for payment for medical care do not meet the cost of care at Department standards for the services and/or supplies provided.

Only services and supplies which meet the Department of Health, Education and Welfare definition of medical services, and can be paid by vendor payment, are provided through the Medical Assistance Program.

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To make this determination the Department may impose prior approval requirements whenever indicated.

1100.2 *Freedom of Choice*

Recipients have freedom of choice among participating providers of medical services. They are free to accept or reject any medical care or treatment plans recommended subject to provisions as indicated in PO-425.2, 430.2, 440.2(c).

Chapter 1100 Provision of Medical Services GA

The provision of medical services to recipients of General Assistance and Aid to the Medically Indigent restricts payment to necessary or essential medical care, when such care is not available without charge or covered by health insurance, and to the extent that resources available for payment for medical care do not meet the cost of care at Department standards for the services and/or supplies provided. Preventive care is not considered *essential.*

Prior to authorization of medical services outlined in this chapter, the possibility of securing these services from other agencies is to be explored.

The Department may distinguish and classify the medical services to be provided in accord with the classes of persons eligible for medical aid.

1100.1 *Essential Medical Care*

Essential medical care is defined by the Department as that which is generally recognized as *standard* medical care required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the essentialness of medical care provided in individual situations based on recommendations of technical, professional staff and advisory committees.

To make this determination, the Department may impose prior approval requirements whenever indicated.

1100.2 *Freedom of Choice*

Applicants and recipients shall be entitled to free choice of those qualified vendors of medical services meeting the requirements and complying with the rules and regulations of the department.

IDPA, Medical Assistance Program Handbook For Physicians

100. Illinois Medical Assistance Program

101. *Authority*

The Illinois Medical Assistance Program is the Federal-State public assistance program which implements Title XIX of the Social Security Act (Medicaid). It is administered by the Department of Public Aid under Article V of the Illinois Public Aid Code. The Department has statutory responsibility for the formulation of policy in conformance with Federal and State requirements.

102. *Objective*

The objective of the Medical Assistance Program is to enable eligible recipients to obtain essential medical care and services necessary to preserve health, alleviate sickness, and correct handicapping conditions. Such care and services are provided when they are not either available without charge or covered by health insurance or other third party resource.

Essential care and services are those which are generally recognized as standard medical services required because of disease, disability, infirmity or impairment. The Department reserves the right to determine the necessity of providing medical care in individual situations, with the determination based on recommendations of technical and professional staff, and advisory committees.

Both fiscal considerations and good administrative practice require the imposition of certain limitations and controls on the kind and amount of medical care and services covered in the Medical Assistance Program. Careful review of the subsequent material will enable the medical services provider to identify specific Program coverage and limitations.